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No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

v.

SLATTERY GROUP, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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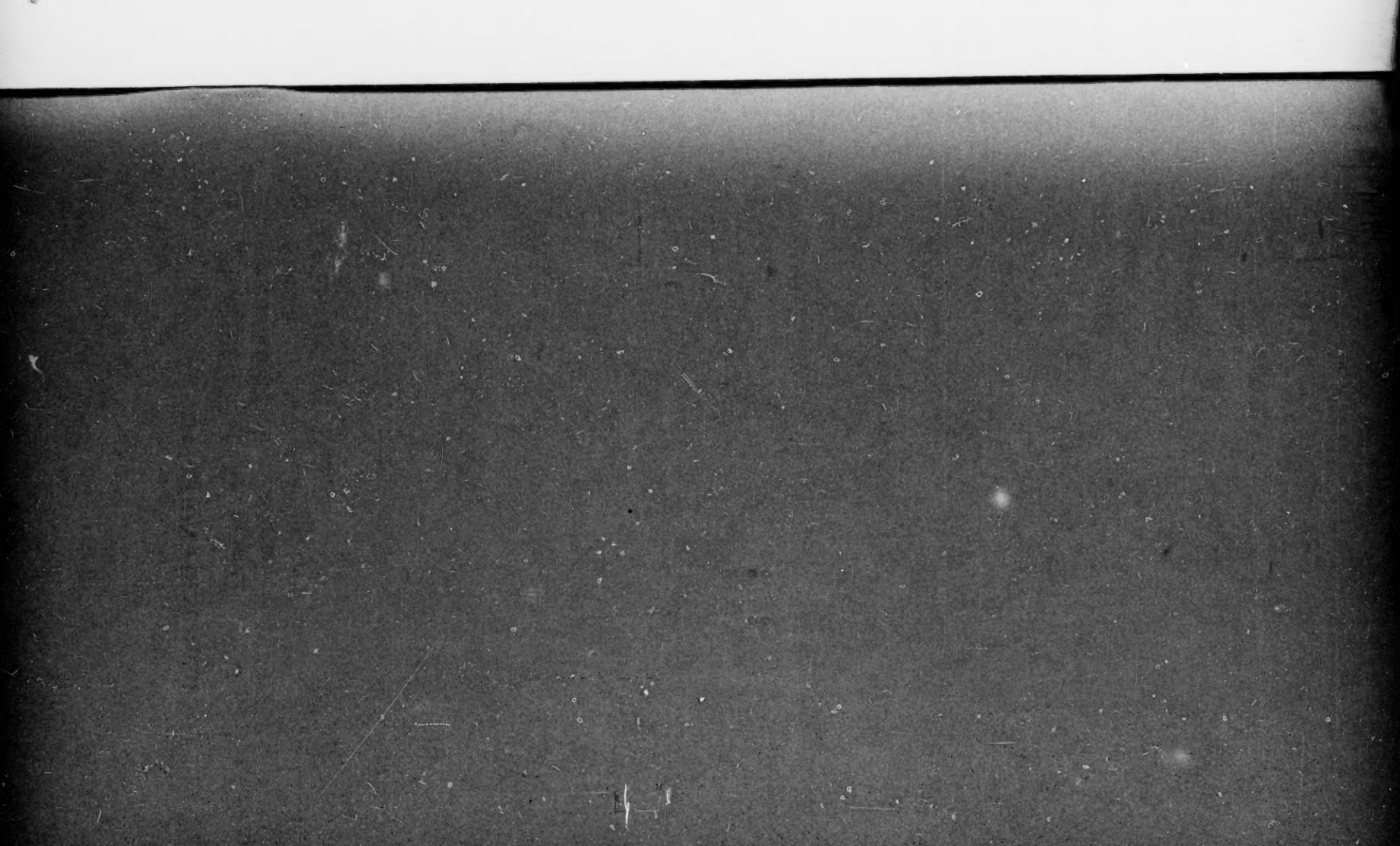

QUESTION PRESENTED

Should this Court review by writ of certiorari a decision based on a distinctive contractual arrangement and on findings made by two lower courts about the terms of that arrangement and the conduct of the parties?

PARTIES TO THE PROCEEDING

The statement in the Petition that the United States intervened in the district court to assert an interest similar to petitioners is misleading. The United States intervened on behalf of the Veterans Administration solely to recover from respondent Slattery Group, Inc., the costs of medical expenses incurred by the Veterans Administration in treating a few class members. This claim was based on the theory that if those persons were entitled to medical benefits from respondent, then their expenses should have been paid with those benefits. The United States did not appear, much less participate, either at trial or in any aspect of the appeal to the Eighth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Other Authorities:

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INTRODUCTION

Respondent Slattery Group, Inc., sued below under its former name, Alpha Portland Industries, Inc. ("Alpha"), respectfully prays that this Petition for a Writ of Certiorari be denied.[1/] The two theoretical questions raised by the Petition are abstract and conjectural in this case because they are not actually framed by the facts established at trial and found by the lower courts. Accordingly, neither question should be reviewed by this Court. Furthermore, there is no genuine issue

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[1] Pursuant to Rule 28.1 of this Court, we hereby state that this respondent has no parent company or affiliate and no subsidiaries except wholly owned subsidiaries.

of "uniformity" here. As reflected by our restatement of the question presented, the real issue in this case is dependent on the unique facts and evidence of record and turns on evaluations of the credibility and the weight given to the evidence by the lower courts rather than upon any fundamental legal or policy issue. Such matters are simply not the stuff of which this Court's docket is composed.

STATEMENT OF THE CASE

This case involves Alpha's action in discontinuing payment of certain "welfare" benefits (life insurance and health benefits) to a class of hourly retired workers upon the expiration of a collective bargaining agreement with the International Cement, Lime, Gypsum and Allied Workers Union. Although petitioners repeatedly use general terms such as "Retiree benefits" or "retirement benefits" and rely on a number of pension cases, this case has nothing to do with pensions; all pensions for these retired workers continued after the expiration of the bargaining agreement and are not affected by this case.

The trial of this case involved many disputed fact issues, with some direct contradictions in the evidence and many differences over the proper inferences to be drawn from that evidence. Petitioners' Statement of the Case totally distorts the record by omitting the evidence favorable to Alpha and disregarding the actual findings of the lower courts. Both the district court and the Court of Appeals for the Eighth Circuit generally adopted respondents' evidence and the inferences arising therefrom rather than the factual propositions advanced by petitioners. A comparison of the statement of the underlying facts on pages 4 and 5 of the Petition with the facts as found by the lower courts reveals that petitioners are now presenting a version of the evidence that has been rejected at each stage of this case.

The key facts that emerge from the lower courts' findings are clear. At the time any class member retired, his welfare benefits were provided by documents whose terms and duration were

the subject of collective bargaining with the Union (which then represented him as an active employee and union member). Each such agreement effective after 1973 (a) had a limited duration and expired in its entirety, (b) contained absolutely no statement that retiree welfare benefits lasted beyond its expiration, (c) specifically renewed welfare benefits for persons retired before it became effective, and (d) specifically provided that retiree welfare benefits could be changed. Indeed, each agreement reduced benefits for some prior retirees through its coordination of benefits provision. Appendix to Petition for a Writ of Certiorari ("App.") 4-5, 13.[2/]

Each pre-1973 agreement likewise had limited duration and made no commitment to lifetime benefits. Although petitioners state that "no specific reference to durational limits for those retirement benefits appeared" prior to 1965, the Court of Appeals correctly summarized a variety of provisions in collective bargaining agreements, plan booklets and insurance policies which indicated that retiree benefits were not guaranteed for life. *Compare* Pet. 4 *with* App. 3-4. Although petitioners say that "Alpha offered no testimony from any of its 1965 benefits negotiators," both lower courts found that there was such testimony. *Compare* Pet. 4 *with* App. 4, 31.

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[2] Although petitioners make bold statements of "fact" about the universality of provisions coordinating benefits with Medicare (Pet. 9, 19), there was no such evidence. More importantly, petitioners ignore the key point that both lower courts correctly emphasized — beginning in 1966 for some plants and in 1973 for all plants, Alpha and the Union agreed to a form of coordination of benefits which reduced the amounts that workers who were ***already retired*** would receive from Alpha. App. 12, 15, 59. This reduction of benefits payable to existing retirees, a fact not addressed in any other reported decision, was properly regarded as evidence that the parties did not think at any time that they had provided a lifetime guarantee to retirees. In this regard, we also note that there is a misprint on page 12 of petitioners' Appendix as initially filed; the Court of Appeals found that the 1966 reduction was *inconsistent* with plaintiffs' theories.

In addition to the text of the documents, the conduct of the Union and Alpha also demonstrated that they did not intend to provide lifetime benefits. When Alpha announced the discontinuation of retiree welfare benefits in 1982, the Union wrote various retirees expressly telling them that the benefits were limited in duration and that Alpha had a "perfect right" to discontinue them. App. 7-8; ***see also*** Exhibits B-12 and E-14. The Union took other actions consistent with Alpha's position and never claimed that the company was obligated to pay benefits for life. ***See*** App. 51-52; Tr. 2:237-38; 3:145-46. Indeed, when Alpha indicated in 1981 meetings held at the plants that the benefits would probably not be continued for long, no one told Alpha that it was obligated to provide benefits for life.

Petitioners selectively rely on the writings of the International Union President when it suits their purposes (Pet. 4), but they seek to have this Court make a credibility determination and discount both his direct testimony that the 1973 Insurance Agreement he helped draft did not guarantee welfare benefits beyond the expiration of the collective bargaining agreement and his letters to several retirees flatly stating:

> "There is nothing in the collective bargaining agreement itself, or in the Insurance and Health Agreement which guarantees retirees' benefits for life, nor is there any language in these agreements that talks about vesting of these benefits, and these benefits will expire of their own force on May 1, 1982.
>
> "Pensions, unlike health and welfare benefits, are paid from an actuarially predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid for by the employer contributions and last only for the life of a collective bargaining agreement."

Compare Pet. 6 *with* App. 7-8.

Any fair reading of the lower court opinions demonstrates that petitioners' repeated references to evidence that lower courts "ignored," "rejected" or otherwise disregarded reflect determinations on credibility and the weight of evidence rather than any refusal to consider evidence petitioners proffered. For example, petitioners say the Court of Appeals "rejected" evidence about continuation of benefits during strikes, when in fact the court directly considered that proof, contrasted it with the strike-related evidence in other cases, and concluded that "the facts in this case do not support" petitioners' argument. *Compare* Pet. 7 *with* App. 13 n. 3.

Finally, petitioners' description of the reasoning and analysis of the lower courts is simply not accurate. For example:

1. Petitioners state that the Eighth Circuit held that the 1978 "summary plan description need not be used by the trier to construe the ambiguous terms of the formal document or to derive intent absent a prior showing of worker reliance" (Pet. 7). Indeed, this characterization of the Eighth Circuit's holding represents the entire second question raised by the Petition. *See* Pet. 20-21. The Court of Appeals did, however, consider that document on the issue of intent, and after such consideration it reaffirmed the conclusion of the district court that the "SPD" was not controlling in light of all the evidence, including the determinations of witness credibility. App. 15.

2. Petitioners apparently claim that the Eighth Circuit held as a matter of law "under law and custom that benefits for retirees expire with the expiration of the labor agreement, unless retirees *prove* the drafters actually intended the benefits were to last for retirees' lifetime" (Pet. 6, emphasis in original). *See also* Pet. 10, 12-13. In the same vein, the Petition repeatedly says that the Eighth Circuit required the class to prove that the subjective intent of the parties was consistent with the SPD. Pet. 10, 15, 16-17. One searches in vain for either of these supposed holdings. To the contrary, the Court of Appeals merely held that whether the benefits extended beyond the

duration of the agreement which created them depended on the intent of the contracting parties, and that petitioners, like any plaintiffs, had the burden of proof on their claims. App. 9-10. There is no reference to "subjective" or "undisclosed" intent anywhere in the Court of Appeals' legal analysis. *See* App. 12-17.

3. The allegation that the Eighth Circuit "would give no consideration to trust principles, nor consider the purposes of ERISA or whether ERISA requirements had been met" (Pet. 6) is also flatly untrue. The lower courts' search for the intent of the parties is, of course, a trust principle as well as a contract requirement. SCOTT ON TRUSTS, 3d Ed. 1967 § 164.1 The Court of Appeals carefully studied and distinguished the different Congressional purposes behind the differing treatment of welfare benefits and pension benefits; it then concluded that its decision was consistent with the ERISA policies specifically applicable to welfare benefits. App. 8-11. And the Court of Appeals expressly considered the ERISA requirement of an accurate summary plan description. It did not, as petitioners claim, decide that this requirement only applied to pensions; petitioners failed to recover on their claims based on the 1978 SPD because they did not offer a scintilla of evidence that anyone did anything in reliance on that document. *Compare* Pet. 14 *with* App. 16-17.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Is Based on the Distinctive Contractual Arrangement Between the Parties, Which Has No Precedential Effect for Other Cases, and on Findings of Fact That Will Not Be Reviewed by This Court.

Taking the facts as found by both lower courts, as opposed to the facts described in the Petition, the decision below is plainly a correct determination of the legal consequences of certain unique contractual agreements. The precedential effect of such a decision is sharply circumscribed.

Furthermore, the result below rests on factual findings made by the district court and basically accepted, with minor caveats or supplementations, by the Court of Appeals. Since there are no extraordinary reasons shown, in these circumstances this Court would not and should not review those factual determinations. *Goodman v. Lukens Steel Co.*, ____ U.S. ____, 107 S. Ct. 2617 (1987); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949). Accordingly, it would be pointless and unproductive to grant a writ of certiorari.

II. The Questions Presented by Petitioners Are Completely Fact-Based and Are Not Actually Framed by the Facts Found by the Lower Courts.

A writ of certiorari should not be granted to review the second question presented by petitioners for the simple reason that it is in no way raised by this case. As noted above, the lower courts *did* use the summary plan description in construing plan terms. *See* App. 15. Petitioners' grievance is simply that the lower courts, after doing so, did not find that isolated piece of evidence dispositive and did not resolve the evidence in the way hoped for by petitioners. The second question presented is therefore academic to this lawsuit and does not merit review. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Review of the first question presented by petitioners is also unwarranted for several similar reasons. To the extent the question is directed toward a purported failure to apply "trust principles," it is again simply not presented by this case because petitioners have mischaracterized the opinion of the Court of Appeals. The courts below did apply the settled trust principle that focuses on the intent of the parties. Petitioners are merely quibbling with the application of that principle to these particular facts and, indeed, with the findings of facts by the lower courts. This Court does not grant certiorari to review such matters. *E.g., General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178 (1938).

To the extent the first question calls for creation of a new burden of proof, shifted to a different party based on the language of a summary plan description, it does not merit review because it turns on the contents of a distinctive document and is therefore not of general importance. Moreover, petitioners have neglected to tell the Court several key facts which demonstrate that the record does not provide a basis for resolution of the issue they attempt to frame. This Court should plainly not strain to grapple with the question presented on this record. *See Weber v. Opera on Tour, Inc.,* 314 U..S. 615 (1941).

First, the 1978 SPD did not apply to all Alpha's retirees; it covered only workers who retired after 1978. App. 50. In November 1977, however, Alpha distributed to all already retired hourly employees a summary plan description, applicable to both the pension and welfare benefit plans, which stated in pertinent part that Alpha reserved "the right to terminate the plans should business conditions warrant it" and that only certain pension benefits would be paid thereafter. Tr. 2:231-32; Exhibit S-2, p. 29. This 1977 SPD, issued to pre-1978 retirees, certainly could not in any way be read to describe welfare benefits as guaranteed for life.

Second, this case is not appropriate for creating a new burden of proof based on the 1978 SPD because the meaning of that document was not definitively resolved below. There was substantial evidence that it did not express a lifetime guarantee,[3/] and this Court should not use petitioners' argument about its meaning as a springboard for plenary review.

Third, the legal significance of the SPD was also not resolved below because it was unnecessary for the lower courts to do so. In view of the text of the collectively-bargained agreements, the testimony of their drafters and the conduct of the parties, petitioners' theory of SPD primacy is inconsistent with the federal statutes and policies supporting collective bargaining. Again, this Court should not make new law in a case where such a basic issue was not decided below.

[3/] The 1978 SPD was prepared by Alpha without collective bargaining and was issued subsequent to the collective bargaining that resulted in the definitive 1978 plan instrument. That 1978 collectively-bargained agreement (like earlier agreements) did not say a word about retiree welfare benefits being for life, and the Union president forthrightly admitted that it did not provide lifetime benefits. The SPD contained the express statement that the plan was "maintained under a collective bargaining agreement" (Exhibit E-1, p. 15), and it advised the active employees, "[I]f you have a specific question you should consult the plan document . . ." (*id.* p.i). Furthermore, there was direct evidence that the 1978 SPD could be read as simply confirming that benefits for retirees' spouses did not survive the retirees' deaths and therefore as not referring at all to the duration of an obligation to provide welfare benefits to retirees. App. 59; Tr. 2:249-51; 4:4-6, 11-12; Miechur deposition 213-14.

III. The Alleged Conflicts Among the Circuits Are Largely Illusory and Are Not Related to the Questions Presented by Petitioners, and There Is No Other Need for Review To Provide Uniformity.

Petitioners consistently and seriously overstate any differences among the circuits. Petitioners do not and cannot show that a single other circuit has affirmatively answered the first question they pose, and we submit that this failure alone sounds the death knell for certiorari review of that question. The Eighth Circuit correctly noted that even the Sixth Circuit has not actually adopted petitioners' theory. *See* App. 10.

Nor is it accurate to say that the Ninth Circuit expressly "sides with the Sixth Circuit" (Pet. 12). In *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984), that circuit merely reversed a grant of summary judgment to the employer — it did not resolve the merits or create a new burden of proof. Indeed, in *Turner v. Teamsters Local Union No. 302*, 604 F.2d 1219 (9th Cir. 1979), the Ninth Circuit held that welfare benefits were not guaranteed beyond the expiration of a collective bargaining agreement.

Similarly, and again contrary to petitioners' claims, the Fourth Circuit has not in any way suggested that an employer's obligation to provide retiree welfare benefits presumptively extends beyond a contractual term applicable to that obligation or is subject to a novel burden of proof. *See District 29 (UMW) v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985).

Petitioners cite a number of cases that reach a different result than the Eighth Circuit did here. The Court of Appeals carefully and accurately distinguished on the facts many of these cases, thus highlighting that these cases are fact-based and not fungible. *See, e.g.*, App. 12 n.2 & 14 n.4.

There are, of course, other cases finding that particular retiree welfare benefits were not guaranteed for life. *E.g., International Union (UAW) v. Roblin Industries*, 561 F. Supp.

288 (W.D. Mich. 1983). The lesson of such an exercise is merely that all such cases, including this one, involve and turn on their respective, different facts. Accordingly, petitioners' grandiose claims about the broad economic impact of review are simply overblown rhetoric. The Court does not and should not review cases when the decision below does not involve an important question of general impact, even if there is an appealing underlying context (*i.e.*, retirement benefits).

This case is totally unrelated to ***Firestone Tire and Rubber Co. v. Bruch***, No. 87-1054, 56 U.S.L.W. 3682 (1988). Petitioners' first question is not, as they allege (Pet. 2, 16), presented by that case. As discussed in more detail in the opposition filed with this Court in the related case of ***DeGeare v. Slattery Group, Inc.***, No. 87-2070, the resolution of ***Bruch*** could not possibly affect the result in this case. Alpha has already prevailed under a neutral standard similar to that used by the Third Circuit in ***Bruch*** less favorable to Alpha than that which might be adopted by this Court.

There is certainly no existing precedent of this Court that would dictate creation of an extraordinary burden of proof in this case. This Court did not impose any such burden of proof in ***Schneider Moving & Storage Co. v. Robbins***, 466 U.S. 364 (1984), or ***Lewis v. Benedict Coal Corp.***, 361 U.S. 459 (1960). The Court in ***Robbins*** looked to the same evidence the Eighth Circuit used in this case — the governing agreements and the surrounding circumstances. ***See*** 466 U..S. at 372-73. The result in ***Robbins***, like the result below, stemmed from the absence of sufficient evidence to support the interpretation proposed by the petitioners. To the extent that ***Lewis*** involved interpretation

of the contract, the Court also used normal contract principles. *See* 361 U.S. at 465-66.[4/]

Finally, review of this case is not necessary to implement ERISA and would not contribute to that statute's application by other courts. In fact, the first question presented totally misapprehends the statutory structure and purposes of ERISA. As the Eighth Circuit observed, Congress did *not* provide that summary plan descriptions shift the burden of proof or affect that burden in any way. As the Eighth Circuit also noted, the circuits have *uniformly* held that a claim to recover benefits based directly on the terms of a summary plan description requires proof of reliance. App. 16. *See also Bachelder v. Communications Satellite Corp.*, 837 F.2d 519 (1st Cir. 1988) (reversing a district court case relied on below by petitioners and canvassing other circuits).

There is no other ERISA-based policy that would justify this Court's consideration of a new and novel burden of proof for retiree welfare benefit cases. The Eighth Circuit correctly noted that Congress distinctly exempted welfare benefits from the requirements of vesting, funding and non-forfeitability imposed by ERISA to prevent loss of pension benefits. App. 9. There are sound practical reasons, based on the uncertainties associated with welfare benefits, why such benefits frequently are not and should not be guaranteed for life. *See* App. 56.

[4/] Petitioners' suggestion that *Ft. Halifax Packing Co. v. Coyne*, ___U.S.___, 107 S.Ct. 2211 (1987), is inconsistent with the decision below is unfounded. In *Ft. Halifax*, this Court simply applied the text of ERISA'S preemption section, 29 U.S.C. § 1144(a), which expressly refers to a plan and not to benefits. This case, in contrast, is brought under 29 U.S.C. § 1132, which only provides jurisdiction to sue for benefits due "under terms of his plan" or to enforce rights associated with "the terms of the plan." *See* App. 67. The Court of Appeals therefore had no authority to award benefits not guaranteed by the plan as interpreted by the court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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